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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO, *Petitioners,*

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Respondents.*

On Petition for A Writ of Certiorari to the Supreme Court of Florida

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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I.

In the petition for certiorari, petitioners brought to the Court's attention the recent decision of the Sixth Circuit Court of Appeals in *General Motors Corp.* v. *National Labor Relations Board,* — F. 2nd —, 50 L.L.R.M. 2396, wherein the Sixth Circuit held that under Section 8(a)(3) of the National Labor Relations Act, as amended, an agency shop agreement is

unlawful. As we noted the Sixth Circuit's decision is in inescapable conflict with the decision of the Florida Supreme Court.

Since the filing of our petition for certiorari, the Solicitor General on behalf of the National Labor Relations Board has petitioned this Court for certiorari in the *General Motors* case. (*National Labor Relations Board* v. *General Motors Corp.*, No. 404, October term, 1962.) According to the Solicitor General's petition, the *General Motors* decision "appears to conflict in principle with recent State court decisions holding that State right-to-work laws, drafted only in terms of 'membership,' outlaw the agency shop." (Pet., p. 19, *National Labor Relations Board* v. *General Motors*, No. 404, October Term, 1962.) Similarly, the AFL-CIO has filed a brief in this Court as *amicus curiae* supporting the Solicitor General. In its brief the AFL-CIO also draws the Court's attention to the conflict between the decision of the Sixth Circuit and that of the Florida Supreme Court. The AFL-CIO urges the Court to consider the petition of the Solicitor General and the instant petition together because of the "complex interrelationship" of these cases. The AFL-CIO further urges the Court to grant certiorari in both cases. (AFL-CIO *amicus curiae* brief, pp. 19-22, *National Labor Relations Board* v. *General Motors Corp., supra.*)

Although our petition for certiorari discusses the *General Motors* case and its impact on the decision of the Florida Supreme Court, respondents make no reference to the *General Motors* case in their brief opposing certiorari. Respondents apparently recognize that there is a conflict between the Florida Supreme Court's decision and that of the Sixth Circuit, and that much

confusion has resulted therefrom. Review by this Court of both decisions is essential to resolve the conflict and provide parties in interstate commerce with a clear understanding of the law governing this critical issue.

Respondents similarly do not contest that the issue in this case is one of extraordinary importance to millions of workers in the nineteen right-to-work states. On the contrary, respondents' brief in opposition summarizes its position on the merits and, if anything, far exceeds petitioners' views of the magnitude of the case by asserting that the case raises questions which challenge "the basis on which our democracy was founded." (Brief in Opposition, p. 13.)

II.

Respondents rely upon this Court's decision in *American Federation of Labor* v. *Watson*, 327 U.S. 582 (1946), for the self-evident proposition that the "construction of state constitutional and statutory provisions is left to the states in the first instance" and that "the authority of the Florida Supreme Court to interpret and construe its own constitutional provision as invalidating the Agency Shop cannot be seriously or arguably contested." (Brief in Opposition, pp. 9-16.)

This argument begs the question. The issue herein is not whether the Florida Supreme Court has the authority to interpret its own constitutional provision, but whether the court has interpreted its constitution in conflict with the National Labor Relations Act and the supremacy clause of the federal constitution as applied to the parties in this proceeding. The court

expressly left this question open when it decided *Watson*, stating only that the Florida constitutional provision involved herein could not be said to conflict with federal law until its meaning and application had first been passed upon by the court of Florida and that the Florida law "may be so construed as to eliminate any conflict alleged to exist between it and the National Labor Relations Board." 327 U.S. at 598.

Now the Florida Supreme Court has provided an interpretation and application of the Florida law making the case ripe for review by this Court.

III.

Respondents rely upon cursory references to the legislative history to support Florida's right to ban "interstate 'agency shop' agreements." They point out that some members of Congress commented that Section 14(b) was intended to authorize the states to prohibit "compulsory unionism."

Respondents' reliance upon this nebulous legislative history is misplaced. In any event it does not contradict the express language of Section 14(b) of the Act which reserves to the state only the right to prohibit contracts requiring "membership in a labor organization as a condition of employment." The legislative history clearly evidences Congressional awareness of the "agency shop," and that Congress failed to deal with the "agency shop" directly despite this awareness. See Senator Taft's comments on the "agency shop" in the Senate Debate, 2 L.H. of L.M.R.A., 1422. On the other hand, respondents' references to the legislative history demonstrate the lack of any clear expression of Congressional intent to permit the states to ban "agency shop" agreements. Thus, respondents'

brief actually underlines the urgency for review by this Court of the decision below so as to clarify the meaning of Section 14(b) of the Act.

IV.

Respondents' unequivocal assertion that the "substantive issue involved [here] was heretofore presented and decided by this Court in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301 (1948)" withers under analysis. First, the *Algoma* case arose under the Wagner Act before Section 14(b) was even enacted. Second, *Algoma* involved a contract requiring the maintenance of "membership" in a labor organization, not an "agency shop" which does *not* require "membership." Third, *Algoma*, decided fourteen years ago, preceded this Court's development of the doctrine of federal preemption of interstate labor relations, of which the most recent expression is found in *Marine Engineers Benevolent Association* v. *Interlake Steamship Co.*, U.S. , 82 S. Ct. 1237 (1962). Fourth, respondents simply ignore this Court's *per curiam* reversal of the Wisconsin Supreme Court's decision in *Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953 (1950), on federal preemption grounds, involving facts virtually identical to those of *Algoma*.

While it is true that several right-to-work states, like Florida, regard the *Algoma* decision as dispositive of their authority to outlaw "agency shop" agreements in commerce, such reliance emphasizes the need for this Court to decide the question directly. In our opinion the *Algoma* decision is at best tangential to the issue herein, and in any event has been implicitly over-

ruled by *Plankington*. Continued, uncritical reliance on *Algoma* by the state courts as being dispositive of the issue is wholly unwarranted.

V.

Reciting generalities and ignoring realities, respondents assert that the judgment of the Florida Supreme Court is not final because it remanded the cause to the "trial court for proceedings not inconsistent with the opinion." (Brief in Opposition, pp. 7-8.) This is completely specious, for "nothing remains to be done but the mechanical entry of judgment by the trial court." *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S., 379, 382 (1953).

Respondents apparently believe that the mere remand to the trial court *ipso facto* means that the judgment below is not final. This Court for many years has rejected the notion that finality is governed by the language of remand on the face of the judgment itself. *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543, 546-548 (1947).

What questions remain to be decided on remand in the trial court? According to respondents, the trial court has yet to "either enter or deny a permanent injunction in the instant case, and decide on an accounting or award damages." (Brief in Opposition p. 8.) The trial court *must* enter a permanent injunction. Any other action would not be consistent with the Florida Supreme Court's decision and judgment. Florida law holds trial courts to an inflexible standard of adherence to appellate court decisions. *Berger* v. *Leposky*, 103 So. 2d 628 (Fla. 1958). Because this is a simple action to enjoin the operation of a contract, the issues of damages and an accounting are negiligible

and *de minimus*, requiring only a perfunctory and routine judicial act. No element of discretion is involved. Moreover, this Court has said that in "accounting cases, that which still remains to to litigated can scarcely give rise to new federal questions. The policy against fragmentary review has therefore little bearing." *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 71-72 (1948).

In every legal and practical sense, the judgment of the court below is final, and this litigation has come to an end in the state courts. There are only two issues in this litigation: whether the "agency shop" clause on its face violates Florida's right-to-work law and whether Section 14(b) of the Taft-Hartley Act deprives the state courts of jurisdiction to proscribe this "agency shop" clause. The Florida Supreme Court has definitively resolved both of these issues against petitioners. Petitioners have no other defenses to this action. If this case is remanded to the trial court at this stage, there is no issue of fact or question of law remaining. The facts are all admitted and self-evident, for the contract itself is admitted and is in evidence. There are no other defenses which petitioners have to this action, for all of respondents' defenses were finally disposed of by the Florida Supreme Court. The decision of that court is now the law of the case. In short, nothing remains to be done in the trial court except the ministerial, mechanical entry of judgment against petitioners.

Pope v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953), is the complete answer to respondents' finality contention. Even more recently, this Court rejected a finality contention in a case where, unlike here, the *only* issue decided by the state's highest court was

jurisdictional and where *every* issue of state substantive law was undecided. *Madruga* v. *Superior Court,* 346 U.S. 556 (1954). See also *Boyd* v. *Grand Trunk Western R. Co.,* 338 U.S. 263 (1949), and *Drivers Union* v. *Meadowmoor Co.,* 312 U.S. 287 (1941).

Unlike *Gospel Army* v. *Los Angeles,* 331 U.S. 543 (1947), where on remand by the state high court a new trial resulted and where new issues of fact and defenses of law could be raised, there will be no new trial here, and there is nothing left to try. *Berger* v. *Leposky,* 103 So. 2nd 628 (Fla. 1958). Unlike *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62 (1948), on remand here there are no alternative possibilities for disposition on this case on state law grounds or possibilities for raising new federal questions.

This Court has said that the purpose of the final order rule under 28 U.S.C. § 1257 is to avoid fragmantary review. *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69 (1946). That purpose would be fulfillled by granting review to the petition here, for nothing substantive remains to be done below. If deprived of review, petitioners would be subjected to the needless expense and delay of a second and perfunctory series of appeals through the Florida courts, all as a matter of formality.

VI.

Respondents' assertion that the Statement in the petition contains "facts .... not contained in any Record presented to the Supreme Court of Florida or to this Court" is patently untrue. (Brief in Opposition, p. 3) Respondents do not point to a *single* fact which is even alleged to be outside the record here.

Moreover, every fact stated in the petition is specifically supported by one or more record references, and respondents do not challenge any of them in any respect.

Respectfully submitted,

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